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Federal Communications Commission  
Office of the Secretary

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In re: )  
GAF BROADCASTING COMPANY, INC. )  
 )  
 )  
Licensee of FM Radio Station )  
WNCN, New York, New York )

To: The Commission

OPPOSITION OF GAF BROADCASTING  
COMPANY, INC. TO "PETITION TO REQUIRE  
FILING OF EARLY RENEWAL APPLICATION"

GAF Broadcasting Company, Inc. (GAF Broadcasting), a wholly-owned subsidiary of GAF Corporation (GAF) and the licensee of commercial FM station WNCN in New York, New York, by its attorneys, opposes the "Petition to Require Filing of Early Renewal Application" (Petition), filed on May 18, 1990, by Class Entertainment & Communications, L.P. (Class).<sup>1/</sup> Class asks that, pursuant to Section 73.3539(c) of the Commission's Rules, GAF Broadcasting be directed by the Commission to file an early renewal application for WNCN. The next WNCN renewal application is due on February 1, 1991.

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<sup>1/</sup> A timely motion for a one-week extension of time was filed by GAF Broadcasting and consented to by Class.

I. SUMMARY

In early 1988, an application for transfer of control of GAF Broadcasting, licensee of commercial classical music FM station WNCN in New York, New York, was filed in connection with the proposed buy-out of its parent company, GAF, by a group of GAF management employees. That application was challenged by the The Listeners' Guild, Inc. (Guild), a citizens group of classical music enthusiasts. At the end of 1988, after the Commission Staff granted the transfer of control application, the Guild petitioned for reconsideration. Its petition is still pending.

extraordinary record of performance and unblemished record of compliance with the Commission's rules overwhelms the single, non-broadcast related conviction of Mr. Sherwin and GAF, and that GAF Broadcasting remains fully qualified as licensee of WNCN.

Against this background, Class filed its Petition, which is based solely on some of the prior filings of the Guild and GAF Broadcasting. (The Petition and a June 5, 1990 letter to the Commission from Class' counsel, ignore the facts and legal analysis GAF Broadcasting submitted, last March.) Class' Petition requests that, pursuant to Section 73.3539(c) of its Rules, the Commission call up WNCN's renewal application eight months early so that Class can file a competing application against it. Class says it is a group formed for the purpose of applying for the WNCN facilities, that it is hard at work on its application, and that one of its three named general partners has been a listener of WNCN.

The central thrust of the Class Petition is that, were the Commission to designate WNCN's license for revocation hearing on the basis of the criminal conviction of Mr. Sherwin and GAF, competing renewal applications would be foreclosed until the completion of that hearing. No revocation hearing has, however, been requested by the Guild, Class, or anyone else. Nor has a decision been made by the Commission to hold any hearing concerning GAF Broadcasting's qualifications. As GAF Broadcasting has shown in extensive submissions ignored by Class, under clear Commission precedent, a hearing on GAF Broadcasting's qualifications is not warranted.

Class' claim to standing as a prospective applicant and present or former listener is not correct. Class can file a competing application for the WNCN facilities between February 1, and May 1, 1991 if it wishes. It has not been aggrieved by any action of the Commission. The Commission and the courts have not established an open season for filing competing applications at any time. Since Class' Petition makes no sense unless a hearing to determine the licensee qualifications of GAF Broadcasting is ordered in connection with the GAF LBO transfer of control application, the Petition is, per force, a petition to deny and, as such, hopelessly out of time.

Section 73.3539(c), the early renewal call up rule, was adopted by the Commission without explanation, at least 52 years ago. Since then, early renewal call up has been ordered by the Commission only five times, perhaps because of the doubtful consistency of the Rule with statutory requirements. The Rule itself and subsequent Commission interpretation of it make clear that early call up is an extraordinary, discretionary procedure which the Commission will exercise only in compelling circumstances.

Section 73.3539(c) can be invoked only if (1) a hearing or investigation is being conducted by the Commission or a determination to conduct one has been made, (2) an early renewal application is essential to such hearing or investigation, (3) the filing of an early renewal will provide needed information to the Commission or serve some other essential purpose, (4) compelling circumstances requiring this extraordinary procedure are demonstrated, (5) the request for early renewal call up is supported by

affidavits based on personal knowledge or facts of which the Commission can take official notice, and (6) a substantial and material question of fact is shown to exist. Class' Petition meets none of these requirements. Class' efforts to conjure up "fact" questions -- for example, speculating as to what involvement GAF's Chief Executive Officer, Samuel J. Heyman, may have had in the alleged stock manipulation matter even though he was not indicted, or whether Mr. Heyman was candid in saying he was confident that GAF and Mr. Sherwin would be exonerated -- are frivolous.

To preserve the integrity and effectiveness of the Commission's strict new rules severely limiting settlements of comparative renewal challenges and renewal petitions to deny, it is important that, in rejecting Class' Petition, the Commission make clear that early renewal call up requests cannot be used as a device for circumventing those rules. Class' general partners and its counsel are old hands at filing competing renewal challenges, and dismissing them for large settlements. Early renewal call up petitions represent a potential loophole in the Commission's settlement rules which should be firmly closed.

All of the relevant facts demonstrating GAF Broadcasting's qualifications to continue as the licensee of WNCN are before the Commission now. The issue is ripe for decision. The Commission should make its decision promptly, well before February 1, 1991, when GAF Broadcasting will file its next renewal application for WNCN, and Class (and any other potential competing applicants) can file against the renewal if they wish. The Commission should make

its decision with respect to GAF Broadcasting's qualifications clearly and fully, so that groups such as Class will not be tempted to relitigate.

Were, because of Commission inaction, a comparative renewal proceeding to be commenced against WNCN with the qualifications issue raised by the Guild still unresolved, it would attract license challengers like Class as honey attracts bees, and take years to complete. The Commission's processes would be overtaxed. WNCN would be burdened by the proceeding, to the detriment of the public interest. When, at the end, it was decided that GAF Broadcasting is qualified (as, under clear Commission precedent, it would be), the entire proceeding would have been an unfair, unnecessary, and costly waste of public, as well as private, resources.

## II. INTRODUCTION

Class is said to be a limited partnership "formed for the purpose of filing an application for a new station to operate on the facilities of . . . WNCN. . . ." Class Pet. at 1, 2. Attachments 1-3. None of its limited partners are identified. Three of its general partners are identified, and each affirms that "Class is desirous of filing its application [for the facilities of WNCN] within the earliest time period allowed by the Federal Communications Commission and is actively engaged in preparation of its application." Id., Attachments 1-3.



This is the second effort by the three Class general partners to capture a New York radio station by filing a competing application against an existing licensee. They were (or are) the controlling (53.1 percent) shareholders of Magna Media Corporation, former applicant for the facilities of WOR(AM) and WRKS-FM. WNCN is at least the 19th station whose licensed facilities have been sought by entities represented by counsel for Class.<sup>2/</sup> The Petition is at least the second effort by Class' counsel to invoke Section 73.3539(c) against a licensee.<sup>3/</sup> As the Commission did then, it should reject this latest effort.

### III. FACTUAL BACKGROUND

On April 27, 1988, the Guild, a citizens' group of classical music enthusiasts and listeners to classical music station WNCN, filed a petition to deny the transfer of control of GAF Broadcasting in connection with the proposed leveraged buy-out of GAF Corporation by a group of management employees. The Guild's petition raised the issue of whether GAF was qualified to transfer control of licensee GAF Broadcasting. The Commission's Staff

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<sup>2/</sup> Stations whose renewals have been challenged by Class' counsel include WBBM-TV, Chicago, Illinois; WOR-TV, New York, New York; WWOR-TV, Secaucus, New Jersey; WOR(AM) and WRKS-FM, New York, New York; WAXY-FM, Fort Lauderdale, Florida; WGMS AM and FM, Washington, D.C.; WFYR-FM, Chicago, Illinois; WRKO(AM) and WROR-FM, Boston, Massachusetts; KSOL-FM, San Mateo, California; KALI(AM), San Gabriel, California; WBNX(AM), New York, New York; WYST-FM, Baltimore, Maryland; WOOK-FM, Washington, D.C.; WINX-FM, Rockville, Maryland; and WHYI-FM, Fort Lauderdale, Florida.

<sup>3/</sup> Mainstream Television Limited Partnership, "Petition to Invoke Provisions of Section 73.3539(c) of the Commission's Rules and Petition to Waive Section 73.3516(c) of the Commission's Rules," filed on March 31, 1986 against WOR-TV.

found that GAF was qualified, and the LBO was consummated last year. The qualifications issue remains before the Commission, however, because a petition for reconsideration was timely filed by the Guild on December 14, 1988.

The focus of the Guild's reconsideration petition was the basic qualifications implications of the 1988 criminal indictment of Mr. Sherwin and GAF for allegedly manipulating, in October, 1986, the price of a stock owned by GAF.<sup>4/</sup> GAF has agreed that the qualifications issue remains before the Commission.<sup>5/</sup> If the Commission could not find that GAF is qualified on the basis of the facts available to it, it would, under Section 309 of the Communications Act (Act), designate an evidentiary hearing.

Fearful that persons seeking to exploit Commission inaction for their private advantage would begin to surface, GAF has urged the Commission to get on with deciding the issue of GAF Broadcasting's licensee fitness.<sup>6/</sup> GAF has furnished to the

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4/ The Guild's reconsideration petition was filed after the indictment, but before the conviction, of Mr. Sherwin and GAF. Since the conviction, and since GAF Broadcasting submitted its Supplement (March 13, 1990), the Guild has filed nothing more with the Commission.

5/ The issue is before the Commission in connection with the LBO. A revocation hearing against GAF Broadcasting has never been requested, by the Guild, Class, or anyone else. Nor could it be. See n. 14, below.

6/ Most recently, in a May 18, 1990 letter to Chairman Sikes from Mr. Heyman, delivered and served on the Guild and Class on May 22, 1990.

Commission, in a 65-page Supplement filed in March, 1990, a detailed factual and legal analysis.<sup>7/</sup> It shows the following:

GAF Broadcasting's unblemished and extraordinary record of performance, service, and compliance with Commission rules and regulations overwhelms the single conviction of Mr. Sherwin and GAF. That conviction, which is presently on appeal, arose out of an isolated, aberrational incident of alleged stock manipulation by Mr. Sherwin, not in any way involving GAF Broadcasting, WNCN, or broadcasting. That single claimed incident was the basis for the only criminal indictment of GAF during GAF Broadcasting's 14-year tenure as licensee of WNCN. Under clear Commission precedent, GAF Broadcasting is qualified to continue as the licensee of WNCN. There is, therefore, no justification for a hearing with respect to GAF Broadcasting's qualifications.<sup>8/</sup> Class' petition ignores the Supplement.

#### IV. CLASS LACKS STANDING

Class<sup>9/</sup> claims standing (1) as a potential applicant and (2)

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<sup>7/</sup> The facts with respect to the GAF/LBO transfer application, the Guild's challenge to it, and the criminal conviction of Mr. Sherwin and GAF, summarized in this Opposition, are set

because one of its three named general partners "has been a station [WNCN] listener," and all three reside in the WNCN service area. Class Pet. at 2. Even assuming that an entity which has not filed an application could have standing as an applicant,<sup>10/</sup> Class' standing claim is wrong as a matter of law.

A. Class Lacks Standing as a Potential Applicant.

Class is not a "frustrated competitor." Coalition, at 1356. Aside from the fact that it has not filed a competing application, there is no basis for the unsupported assumption, upon which Class' standing claim depends, that it will not be free to file in eight months.

Class has suffered no economic injury as a result of any Commission action, the touchstone of standing to appeal under Section 402(b) of the Act, in Orange Park.<sup>11/</sup> It has suffered no injury at all.

The core elements of standing are a nexus between the parties; some cognizable, real or potential, direct injury; and the likelihood that injury will be redressed by the relief sought. "The concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding." United Church of Christ v. FCC, 359 F.2d 994, 1002 (1966).

Class is a "prospective applicant" only in the sense that it desires to compete for the WNCN facilities. It or its principals may be "prospective applicants" in this sense against many stations, but such a desire does not confer standing.<sup>12/</sup> If every

<sup>11/</sup> 811 F.2d at 673. See also Coalition at 1357 ("Frustrated license applicants are parties 'aggrieved' within the meaning of § 402(b)(6) . . . because they have a 'concrete, economic interest that has been perceptibly damaged by the Commission's award [of licenses to another competitor].'").

<sup>12/</sup> Indeed, in Atlantic Telecasting Corp., 3 F.C.C. 442, 443, 7 R.R. 2d 297, 299 (1966), aff'd. on other grounds, Lee and Cumberland Broadcasting Corp. v. FCC, 374 F.2d 259 (D.C. Cir. 1967), the Commission said exactly this. In Atlantic, Cumberland, a corporation whose president and primary shareholder, Lee, was a radio licensee in Fayetteville, North

Footnote continued on following page.

entity which intended to file an application had standing, an "open season for the filing of competing applications"<sup>13/</sup> would be established, license term would have no meaning, and the concept of standing would be rendered a nullity. These are things the Commission and the court have refused to do.<sup>14/</sup>

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Footnote continued from preceding page.

Carolina, objected to grant of a television license for Channel 6 in Wilmington, North Carolina, noting that Cumberland was preparing a TV application for Channel 33, Wilmington. The Channel 6 license was granted without hearing. Cumberland then filed its application for Channel 33 in Wilmington. Lee and Cumberland sought reconsideration of the Channel 6 grant. The Commission said that "Cumberland, as a mere prospective applicant at the time [the Channel 6] application was granted, clearly had no standing as a 'party in interest'." Id. at 443. In RKO General, Inc.

B. Claimed Listenership by One Class Principal Does Not Confer Standing as a Competing Applicant

Class also asserts standing on the basis of listenership, resting its claim on RKO General, Inc. (WOR-TV), 1 F.C.C. Rcd. 1081, 1082, 61 R.R. 2d 1069, 1072 (1986). Class Pet. at 2. In that case, however, the petitioner had filed both a petition to deny, for which listenership is a standing criterion,<sup>15/</sup> and, as a "related matter," id. at 1082, a petition for early renewal. Standing was conferred by the Commission on the petitioner, pursuant to Section 309(d), only in its capacity as a petitioner to deny, id., citing Petitions to Deny, 82 F.C.C. 2d 89, 98-99, 48 R.R. 2d 517, 525 (1980).<sup>16/</sup> Here, of course, Class has neither purported to file a petition to deny nor, as discussed below, could it.

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Footnote continued from preceding page.

governed by Section 312 of the Act -- a finding that GAF is unqualified to hold the license to WNCN, which would be tantamount to a revocation order. Section 312, however, vests sole, discretionary authority to invoke revocation proceedings in the Commission, and creates no rights in private parties. See, e.g., City of Kerrville v. Dugosh Flying Service, Inc., 99 F.C.C. 2d 124, 126, 56 R.R. 2d 1456, 1457 (1984); KDSK, Inc., 93 F.C.C. 2d 893, 895, 53 R.R. 2d 283, 285 (1983); Puerto Rican Media Action and Education Council, Inc., 51 F.C.C. 2d 1178, 1179, 32 R.R. 2d 1423, 1425 (1975); Radio Para La Raza, 40 F.C.C. 2d 1102, n. 1, 27 R.R. 2d 836, n. 1 (1972).

15/ See, e.g., United Church of Christ v. FCC, 359 F.2d at 1002. In RKO (WOR-TV), there was no question that the party filing the petition to deny was a viewer, 1 F.C.C. Rcd. at 1082. Here, it is ambiguous whether the Class general partner, who "has been" a WNCN listener, no longer listens to the station, or continues to listen.

16/ The facts that, in WOR-TV, (a) the rejected early renewal call up request was (b) made by Class' counsel, are not mentioned in Class' Petition.

Listeners may be aggrieved by the actions of a licensee,<sup>17/</sup>  
but would-be competing applicants are not.<sup>18/</sup>

C. Class' Petition is, in Fact, a Request For the Commission Not to Affirm GAF Broadcasting's Licensee Qualifications and, as Such, an Untimely Petition to Deny.

Class can, if it wishes, file a competing application against WNCN's renewal on February 1, 1991. Its ability to file such an application is unfettered, by Commission action or otherwise. The Class Petition says that what it wants is for the Commission not to initiate a revocation proceeding, Class Pet. at 16, but no revocation proceeding has been requested. What Class is necessarily requesting is that the Commission not decide that GAF Broadcasting is qualified, for, if it does, there is no basis for Class' Petition. The Class Petition is, then, a petition to deny the GAF LBO and, as such, hopelessly untimely.<sup>19/</sup>

V. SECTION 73.3539(c) IS NOT APPLICABLE TO GAF BROADCASTING AND WNCN.

Class' Petition rests entirely on seldom-used Section 73.3539(c) of the Commission's Rules. Consideration of that Rule



A. History of Section 73.3539(c).

The early renewal call up rule, 47 C.F.R. Section 73.3539(c), was codified in the Commission's Rules in 1938<sup>20/</sup> without explanation.<sup>21/</sup> 3 Fed. Reg. 2836 (1938). The Rule, then known as Section 15.12, was renumbered in 1955 as Section 1.320 (20 Fed. Reg. 9923); in 1957 as Section 1.328(c) (22 Fed. Reg. 10997); again in 1963 as Section 1.539(c) (28 Fed. Reg. 12437); and finally to its present designation in 1979, as Section 73.3539(c) (44 Fed. Reg. 38495), always without explanation or modification.

As discussed below at 25-33, the Rule has been used no more than five times over its 52-year history, most recently 18 years ago,<sup>22/</sup> and then only for the most limited purposes. The Commission's restraint in invoking the Rule, articulated with particular clarity in recent decisions, is perhaps explained by the doubtful ability of the Rule to withstand judicial scrutiny, something it has never received. In particular, serious questions could be raised as to the consistency of the rule with provisions of the Act and of the Administrative Procedure Act which (1) specify license terms, 47 U.S.C. § 307(c), (2) empower the Commission to grant short term renewals, id., (3) impose requirements on the Commission in connection with revocation proceedings, 47 U.S.C. §§

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<sup>20/</sup> A similar provision may have been a part of the Federal Radio Commission's rules.

<sup>21/</sup> The absence of explanation for Commission Rules was more common prior to 1946, when the Administrative Procedure Act was enacted.

<sup>22/</sup> Leflore Broadcasting Co., Inc., 36 F.C.C. 2d 101, 24 R.R. 2d 953 (1972), aff'd. on other grounds, Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980).